

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules) NOTICE OF ADOPTION
I through XX pertaining to reasonable)
accommodations and equal access)

TO: All Concerned Persons

1. On June 9, 2011, the Department of Administration published MAR Notice No. 2-21-446 regarding a public hearing to consider the proposed adoption of the above-stated rules at page 966 of the 2011 Montana Administrative Register, Issue Number 11.

2. On July 8, 2011, the department held a public hearing on the proposed adoption, amendment, and repeal.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: The department received a request for clarification on the use of "agency managers" throughout the policy.

RESPONSE #1: The department will not define "agency managers," since organizational structures vary within state government. The department will include language in New Rule III (2.21.4103) allowing agencies to define "agency managers" consistent with their internal policies and procedures.

COMMENT #2: The department received a request for an online reporting tool, in lieu of the proposed Word document, referred to in New Rule XVI (2.21.4121) to lessen the potential burden on an already busy staff.

RESPONSE #2: The department will not provide an online reporting tool. It has created an Excel spreadsheet in lieu of a Word document. The spreadsheet is available at <http://hr.mt.gov/hrpp/policies.mcp.x>. The department does not believe tracking and reporting of reasonable accommodations will require a significant amount of time or effort regardless of the tool used.

COMMENT #3: The department received a recommendation to clarify New Rule XVIII (2.21.4127). The rule is not clear that managers must consider reasonable modifications to policies, practices, and procedures to promote equal access to programs, services, and activities offered to the public. The statement of reasonable necessity addressed reasonable modifications only in an employment context.

RESPONSE #3: The department will include language in the final rule clarifying that reasonable modifications apply to programs, services, and activities offered to the public to promote equal access.

COMMENT #4: The department received comments concerning terminology, formatting, and sentence clarity under New Rules III (2.21.4103), VI (2.21.4107), IX (2.21.4114), X (2.21.4115), XI (2.21.4116), and XIII (2.21.4118).

RESPONSE #4: The department will make the proposed changes to promote consistency and clarity of the rules.

4. The department has adopted New Rules I (2.21.4101), II (2.21.4102), IV (2.21.4105), V (2.21.4106), VII (2.21.4112), VIII (2.21.4113), XII (2.21.4117), XIV (2.21.4119), XV (2.21.4120), XVI (2.21.4121), XVII (2.21.4122), XIX (2.21.4128), and XX (2.21.4104) as proposed.

5. The department has adopted New Rules III (2.21.4103), VI (2.21.4107), IX (2.21.4114), X (2.21.4115), XI (2.21.4116), XIII (2.21.4118), XVIII (2.21.4127) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

RULE III (2.21.4103) DEFINITIONS (1) and (2) remain as proposed.

(a) "Designated personnel" means agency representatives identified ~~in these rules~~ this subchapter as those responsible for processing reasonable accommodation requests including agency managers (as defined by the agency in policy or rule to promote consistency with internal policies and procedures), ADA coordinators, Equal Employment Opportunity (EEO) officers, human resource staff, and individuals involved in the hiring process.

(b) remains as proposed.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

RULE VI (2.21.4107) RESPONDING TO REASONABLE ACCOMMODATION REQUESTS (1) through (3) remain as proposed.

(4) Employees may refuse the elected accommodation; however, if the employee cannot perform the essential functions of the job, with or without the accommodation, the refusal may limit the employee's ~~may not be qualified~~ qualifications for the position.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

RULE IX (2.21.4114) REQUESTING MEDICAL DOCUMENTATION

- (1) remains as proposed.
- (2) Agency managers may request documentation from an appropriate health care professional when the need for a reasonable accommodation is not known or obvious. If an agency manager requests medical documentation, the manager ~~shall~~:
 - (a) shall provide the request to the applicant or employee in writing;
 - (b) shall explain the need for documentation and limit the request to information about the individual's disability, functional limitations, and the need for a reasonable accommodation to perform the essential functions of the job;
 - (c) shall include a statement to the applicant, employee, or health care provider to not provide genetic information as specified under ARM Title 2, chapter 21, subchapter 40, Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention Policy;
 - (d) may not request more information than required to support the need for a specific type of accommodation; and
 - (e) may not request documentation when the disability and the need for a reasonable accommodation are obvious or when the individual has already provided sufficient information to substantiate their need for a reasonable accommodation.
- (3) remains as proposed.
- (4) Agency managers shall document the time exhausted while waiting for documentation. This time ~~will~~ does not count against the agency's 30-working-day timeline to process the request.
- (5) through (7) remain as proposed.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

RULE X (2.21.4115) APPROVING REASONABLE ACCOMMODATION REQUESTS (1) remains as proposed.

- (2) If agency managers determine the request is reasonable, they ~~must~~ shall:
 - (a) through (e) remain as proposed.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

RULE XI (2.21.4116) REASSIGNING AN EMPLOYEE AS A REASONABLE ACCOMMODATION (1) through (2)(d) remain as proposed.

- (3) If reassigning an employee would violate a seniority system or collective bargaining agreement, it ~~may not be reasonable to reassign~~ is not reasonable to reassign an employee.
- (4) remains as proposed.
- (5) "Vacant" means the position is available when the employee asks for an accommodation, or the employer knows a position ~~will~~ is to become available within a reasonable amount of time. Agency managers shall determine a reasonable amount of time on a case-by-case basis.
- (6) remains as proposed.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

RULE XIII (2.21.4118) DISCHARGING EMPLOYEES WITH DISABILITIES

(1) Agency managers may ~~consider discharging~~ discharge an employee with a disability when the employee is no longer able to perform the essential functions of their job with or without a reasonable accommodation, and ~~they~~ managers have ruled out all possible options.

(2) If denial of a reasonable accommodation results in the discharge of an employee, the appeal process outlined in ARM Title 2, chapter 21, subchapter 65, Discipline Policy or applicable collective bargaining agreement ~~will~~ supersedes the reasonable accommodation appeal process.

AUTH: 2-18-102, MCA
IMP: 2-18-102, MCA

RULE XVIII (2.21.4127) REASONABLE MODIFICATION PROCEDURES

(1) Agency managers shall make reasonable modifications to policies, practices, and procedures that deny, or have the potential to deny, equal access to programs, services, or activities to individuals with disabilities, unless doing so would result in an undue burden or fundamentally alter a program, service, or activity.

(2) remains as proposed.

AUTH: 2-18-102, MCA
IMP: 2-18-102, 49-3-201, 49-3-205, MCA

By: /s/ Sheryl Olson
Sheryl Olson, Deputy Director
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By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
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Certified to the Secretary of State August 15, 2011.